In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 993

THOMAS PICCINI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of fraudulently concealing and conspiring to conceal the assets of a corporation in contemplation of its bankruptcy and with intent to defeat the bankruptcy laws, in violation of 18 U.S.C. 152 and 371. On June 21, 1968, he was sentenced to three years' imprisonment on each count, to run concurrently. The judgment specified, pursuant to 18 U.S.C. 4208(a)(2), that he was to be eligible for

parole at such time as the Board of Parole should deem appropriate (R. 33). The court of appeals affirmed on June 27, 1969.

The petition for a writ of certiorari was not filed until December 23, 1969, 179 days after judgment, and nearly five months out of time under Rule 22(2) of the Rules of this Court. It in any event presents no question meriting further review.

Petitioner was an officer and stockholder of Vanderbilt Candy and Tobacco Company, Inc., a tobacco and candy distributor, the corporation whose assets were involved. In April 1962, after he became associated with the company, he greatly exaggerated the amount of his investment in order to inflate the purported capital stock and show a favorable financial statement for credit purposes. The company soon afterwards embarked on what the court of appeals described as "the classic course of bankruptcy fraud," greatly expanding its purchases on credit and selling at or below cost for cash, or checks payable to cash, which promptly disappeared, with involuntary bankruptcy following in due course. A salesman whom petitioner brought into the company began disposing of large quantities of merchandise at sacrifice prices soon after his entrance upon duty. The company's books and records thereafter disappeared under unexplained circumstances. Checks and cash that were supposed to be deposited in the company's bank account were diverted to other purposes. Merchandise consigned to the company was on occasion trucked away immediately upon delivery. Two codefendants and alleged coconspirators, Monda and Brander, also

officers and stockholders, were shown to have participated in the scheme and there was evidence from which the jury could have found that petitioner received some of the cash which the company was unable to account for (Pet. App. 14-15; Pet. 10).

Petitioner's only contention is that the presentation before the grand jury of certain testimony given by him under subpoena in the bankruptcy proceedings vitiated the indictment and required its dismissal. He relies upon Section 7a(10) of the Bankruptcy Act (11 U.S.C. 25(a)(10)), which provides in relevant part:

> a. The bankrupt shall * * * (10) at the first meeting of his creditors, at the hearing upon objections, if any, to his discharge and at such other times as the court shall order, submit to an examination concerning the conducting of his business * * * and * * * all matters which may affect the administration and settlement of his estate or the granting of his discharge; but no testimony given by him shall be offered in evidence against him in any criminal proceeding * * *.

That provision does not support petitioner's contention, however, because petitioner was not the bankrupt. The corporation was the bankrupt and the fact that petitioner was an officer and stockholder is immaterial. *Kaplan* v. *United States*, 7 F.2d 594, 597 (C.A. 2), certiorari denied, 269 U.S. 582.

It is true that in 1938 the Act was amended to provide, in Section 7b (11 U.S.C. 25(b)):

> b. Where the bankrupt is a corporation, its officers, the members of its board of directors or trustees or of other similar controlling bodies, its stockholders or members, or such of them as may be designated by the court, shall perform the duties imposed upon the bankrupt * * *.

It has been held, however, that the immunity clause of Section 7a(10), read in conjunction with the added provision, applies to an officer, director, or shareholder who testifies in the bankruptcy proceeding only if the witness was specifically designated by the bankruptcy court to perform the bankrupt's duties. *United States* v. *Castellana*, 349 F.2d 264, 273-274 (C.A. 2), certiorari denied, 383 U.S. 928.* There was no such designation of petitioner by the bankruptcy court in this case. His reliance on the *Castellana* decision (Pet. 10) is therefore mistaken.

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* There was a dissent in *Castellana*, as the court below noted (Pet. App. 16, n. 5), and the competing considerations are set out in the majority and dissenting opinions. The majority noted, among other things, that Section 7b, "in merely stating who may be designated to perform the duties imposed upon a corporate bankrupt, makes no explicit reference to extension of the [Section 7a (10)] privilege" (349 F. 2d at 274). Judge Hays, dissenting, thought that the court's holding overlooked what he considered to be the purpose of the two provisions read in the light of each other—to encourage corporate officers, directors, and shareholders to testify freely and fully concerning the pre-bankruptcy activities of the corporation without fear of being confronted with incriminating admissions in a future trial. In *Castellana*, it is to be stressed, the challenged testimony was received at trial; here the testimony was excluded. This critical distinction, as we note in the text, makes it unnecessary in this case to evaluate the competing considerations discussed in the *Castellana* opinions.

At all events, the challenged testimony was excluded at trial. There is therefore no occasion in this case to reach the question of its competence. The indictment returned in this case, as the court below noted, was not based solely on the questioned testimony. Some thirty witnesses testified before the grand jury and fully detailed the situation developed at trial. In these circumstances the court below properly determined not to upset petitioner's conviction, whether or not the questioned testimony was properly before the grand jury. Where an indictment is based on sufficient, legal, and probative evidence, a resulting conviction will not be disturbed solely because other evidence, of doubtful admissibility, was also before the grand jury. *Lawn* v. *United States*, 355 U.S. 339, 349; *Holt* v. *United States*, 218 U.S. 245, 247-248. Cf. *Costello* v. *United States*, 350 U.S. 359. As this Court observed in *Lawn* v. *United States*, *supra*, 355 U.S. at 349: "[A]n indictment returned by a legally constituted nonbiased grand jury, like an information drawn by a prosecutor, if valid on its face, is enough to call for a trial of the charge on the merits and satisfies the requirements of the Fifth Amendment."

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1970.

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